BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

HOOD CANAL, OLYMPIC ENVIRONMENTAL COUNCIL, JEFFERSON COUNTY GREEN PARTY, PEOPLE FOR A LIVEABLE COMMUNITY, KITSAP AUDUBON SOCIETY, HOOD CANAL ENVIRONMENTAL COUNCIL and PEOPLE FOR PUGET SOUND Petitioners, v. JEFFERSON COUNTY Respondent. FRED HILL MATERIALS, Intervenor.	**No. 03-2-0006** **COMPLIANCE ORDER 2004**

I. SYNOPSIS

In 2002, the Jefferson County Commissioners approved a comprehensive plan amendment granting a Mineral Resource Overlay (MRLO) designation to Fred Hill Materials, for the purpose of expanding its existing gravel extraction business. The approved MRLO is located on lands presently designated as Commercial Forest, in the Thorndyke Block of unincorporated Jefferson County, west of the Hood Canal Bridge. In the subsequent 2003 appeal of the adoption of this comprehensive plan amendment to the Board, the Board found that the environmental impact analysis for the MRLO approval did not comply with the State Environmental Policy Act, Ch. 43.21C RCW (SEPA). Jefferson County undertook additional environmental analysis as a result of the Board's order and asks the Board to find it in compliance.

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Petitioners argue that the County's environmental analysis continues to fail to meet the requirements of SEPA because it fails to adequately evaluate the alternatives to the proposed MRLO and fails to address those general aspects of the pit-to-pier project that the Board found were reasonably related to the MRLO. Petitioners also challenge the County's compliance with the public participation requirements of the GMA in the adoption of the MRLO because the County initially advised the public that it could not comment upon the environmental analysis.

The County's adoption is presumed valid and the burden is on the Petitioners to show that the County was clearly erroneous in meeting its obligations under SEPA. In light of this standard of review, we find that the County's environmental analysis, though less than ideal, complies with the requirements of SEPA for comprehensive plan amendments. We find there are many areas in the County's environmental analysis that could have been improved, but we find that they fail to overcome the statutory presumption of validity (RCW 36.70A.320(1)) and the SEPA requirement that the decision of the local government be given substantial weight (RCW 43.21C.090).

In addition, we find that the County's initial refusal to allow public comment on the supplemental environmental analysis failed to comply with the public participation requirements of the Act, but that the County cured this error by providing for public comment at a subsequent public hearing.

II. PROCEDURAL HISTORY

On December 9, 2002, the Board of Jefferson County Commissioners adopted Ordinance 14-1213-02, amending the Jefferson County comprehensive plan with the addition of a mineral resource overlay (MRLO) requested by Fred Hill Materials. This adoption was timely appealed to the Board in a Petition for Review filed on February 21, 2003, by Petitioners. Fred Hill Materials was granted leave to intervene on March 27, 2003. After a hearing on the merits held on June 24, 2003, this Board entered its Final Decision and Order on August 15, 2003. That order found that the environmental analysis prepared for the MRLO failed to "adequately analyze the no action and other

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alternatives to the proposed action." Final Decision and Order, August 15, 2004, Conclusion of Law 3. The County was ordered to bring the challenged comprehensive plan amendment into compliance with the State Environmental Policy Act (SEPA) (Ch.43.21C RCW) within 180 days.

The 180 day compliance period was extended to allow the County time to complete its environmental analysis and, later, to allow the County to relocate its scheduled public hearing to a building large enough to handle the number of members of the public that wished to attend. The County originally scheduled the public hearing on this proposal for May 25, 2004. However, because of the overflow crowd, the County continued the hearing to June 7, 2004, when a larger facility could be used. On July 6, 2004, the Board of Jefferson County Commissioners adopted Ordinance No. 08-0706-04, approving the MRLO requested by Fred Hill Materials.

The compliance hearing was held in Port Townsend on September 2, 2004. Prior to argument, the Board admitted, without objection, exhibits 17-100, 17-101, 17-102, 17-103, 17-104, 17-105, 17-106, and 17-107 proposed by Petitioners in motions to supplement the record.

III. ISSUES PRESENTED

Has the County achieved compliance with Ch. 43.21C RCW (SEPA) with respect to the comprehensive plan amendment adopting a mineral resource overlay (MRLO) as requested by Fred Hill Materials?

1. **Does the Final Supplemental Environmental Impact Statement (FSEIS) adequately discuss the alternatives to the proposed action?**
2. **Does the Final Supplemental Environmental Impact Statement consider the potential development of a pit-to-pier project as a result of the MRLO?**
3. **Did the County violate the public participation requirements of the GMA (Ch. 36.70A RCW) in adopting the comprehensive plan amendment designating the Fred Hill Materials MRLO?**

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4. **Did the County fail to comply with its obligations under SEPA by failing to identify the authors and principal contributors to the EIS?**

IV. BURDEN OF PROOF

Comprehensive plan amendments, such as the one challenged here, are presumed valid upon adoption:

> Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

RCW 36.70A.320(1)

The burden is on the Petitioners to demonstrate that the action taken by the County in this case is not in compliance with Ch. 36.70A RCW. RCW 36.70A.320(2). The board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter." RCW 36.70A.320(3). In order to find the County's action clearly erroneous, the board must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Petitioners also have the burden of showing a lack of SEPA compliance for GMA purposes under the clearly erroneous standard. *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c (Final Decision and Order, May 7, 2001). Whether an environmental impact statement (EIS) is adequate is a question of law. *Citizens v. Klickitat County*, 122 Wn.2d 619, 626, 866 P.2d 1256 (1993). The adequacy of an EIS is tested under the "rule of reason", which requires a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the agency's decision. *Ibid.* The decision of the governmental agency must be accorded substantial weight. RCW 43.21C.090.

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V. ANALYSIS AND DISCUSSION

Issue No. 1: Does the Final Supplemental Environmental Impact Statement adequately discuss the alternatives to the proposed action?

Petitioners challenge the adequacy of the Final Supplemental Environmental Impact Statement (FSEIS) analysis of the alternatives to the proposed action.[1] In the Final Decision and Order in this case, the Board found the 2002 environmental analysis of alternatives to be inadequate. August 15, 2003, Final Decision and Order, Conclusion of Law 3. The Board found that the no-action and 6,240-acre alternatives had only been given a conclusory evaluation, in contrast to the recommended alternative that was evaluated according to 13 factors:

> Neither the draft SEIS or the FSEIS did more than a brief, conclusory evaluation of the no action alternative or the other proposed alternative. The 690-acre staff recommended alternative was evaluated in terms of thirteen factors the County listed as appropriate for evaluation of a mineral resource overlay designation but no other alternative was similarly evaluated.

Final Decision and Order, August 15, 2003, Finding of Fact N.

Petitioners point to the evaluation of the no-action alternative in the FSEIS. Rather than evaluate the impacts of the no-action alternative, Petitioner argues the County relied upon an alleged defect in the notice provisions of its own Unified Development Code to dismiss the no-action alternative. Petitioners' Objections to a Finding of Compliance at 7-10. Petitioners also argue that the County failed to fairly and properly compare alternatives by considering mitigating conditions for any alternative but the approved alternative. Ibid at 17.

The County responds that it did compare the alternatives and the no-action alternative will not protect mineral resource lands as required by the GMA because of failings in the County's own notice requirements: "[t]he current regulatory structure FAILS to provide the proper notice of mining

[1] The Board also found that the FSEIS failed to adequately analyze the potential environmental impacts on wildlife habitat (Finding P) but Petitioners do not challenge the County's compliance with this requirement of the Board's order.

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activity to neighbors because the language does not match what is found in statute." Reply Brief on Behalf of Jefferson County at 4. See also Intervenor's Response To Objections To A Finding Of Compliance at 2-3. The County further argues that the no-action alternative would not be as environmentally friendly as the approved action. Reply Brief on Behalf of Jefferson County at 5.

The County's argument with respect to the failure of the no-action alternative to protect mineral resource lands because of the inadequacy of its own notice provisions is misplaced. First of all, the question of the adequacy of the notice provisions under the GMA is not before the Board on remand. As the Petitioners point out, the Board ruled on this question in the Final Decision and Order and the time for appeal of that decision has long passed. Petitioners' Objections to a Finding of Compliance at 7. The timelines for raising a challenge to a County ordinance or a Board decision cannot be said to only apply to the Petitioners. If Petitioners were the party seeking to re-litigate this issue, the County would surely object that it was not part of the remand, since the remand and conclusion of non-compliance were directed solely to the SEPA analysis.

Second, the SEPA analysis of the no-action alternative should consider that alternative in terms of its environmental impacts, not in terms of the legal ramifications of adopting that alternative as a policy choice. *King County v. Central Puget Sound Bd.*, 138 Wn.2d 161, 184, 979 P.2d 374(1999) ("an alternative may be taken into account for comparative purposes in an EIS even of the alternative's legal status is contested"). This is because the purpose of the requirement for analysis of the no-action alternative is to provide a benchmark against which the other proposals may be measured.[2] The legal advisability of adopting the no-action alternative is a question apart from the SEPA analysis.

Third, the ability to cure the avowed defect in the County's notice provisions lies in the County's sole control. There is nothing to prevent the County from curing the problem it has identified. Moreover, adopting the MRLO does not cure the defect. The County argues that its notice provisions to neighbors concerning mineral resource activities in Commercial Forest lands are inadequate to

[2] We note that Intervenor made this point at argument,

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protect the resource as required by RCW 36.70A.060(1). However, after adoption of the Fred Hill Materials MRLO, the same notice provisions that the County now believes are defective will still apply in all other parts of the designated Commercial Forest lands. Once the County identifies what it believes to be a deficiency, it should correct it rather than use it as a justification for eliminating the no-action alternative.

These flaws in the County's argument do not resolve the question of whether the Draft Supplemental Environmental Impact Statement, March 2004 (Ex. 3-53) ("DSEIS") and Final Supplemental Environmental Impact Statement, May 2004 (Ex. 3-61) ("FSEIS") adequately and fairly analyze the alternatives, however. We must look to the supplemental environmental analysis on its merits and determine whether it adequately analyzes the potential significant adverse environmental impacts of each alternative. The SEPA Rules provide that "[A]n EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality." WAC 197-11-400(2). The SEPA Rules further require that the no action alternative "shall be evaluated and compared to other alternatives." WAC 197-11-440(5)(b)(ii).

Despite the emphasis in the County's ordinance upon the claimed failure of the no-action alternative to provide proper notice of mining activities (Ordinance 08-0706-09, Findings of Fact 20-25), the no-action alternative was evaluated and compared to the other alternatives in the DSEIS and the FSEIS. Although it would have been preferable for the County to devote less of the Draft SEIS to a critique of its own notification procedures[3], it did address environmental characteristics of the no-action alternative: acreage disturbed under the no-action vs. other alternatives; air quality impacts; water quality impacts; impacts on plants and animals; noise impacts; transportation impacts. (Summarized at 2-8 through 2-10 of the FSEIS)

[3] See also WAC 197-11-402(10) ("EISs shall serve as the means of assessing the environmental impact of proposed agency action, rather than justifying decisions already made")

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A key issue with respect to the no-action alternative from the Board's perspective was the difference in environmental impacts between mining 10-acre segments (as a maximum allowed mining area in the absence of an MRLO) and mining a 40-acre area (as allowed in the new MRLO):

> Thus, at a minimum, the EIS should have discussed the difference between the existing ten-acre limitation and the new 40-acre limitation.

Final Decision and Order, August 15, 2003, at 22-3.

The environmental impacts of the no-action (10-acre maximum) and approved alternative (40-acre maximum) are discussed at Section 2.8 of the DSEIS. This includes a summary description of the amount of mining material that might be extracted and the reclamation requirements under each alternative:

- With 40-acre mining segments, more material could be extracted given the same mine area as mining that may occur in 10-acre segments.
- Mining in 40-acre segments would allow for reclamation planning for optimal recovery of a non-renewable resource.
- Mining in 10-acre segments/disturbed areas may result in lack of recovery or loss of non-renewable resources.
- Mining in 10-acre segments would result in relatively small areas of disturbance at any given time, but more area may be required to be disturbed per cubic yard of material recovered.

DSEIS, March 2004, at 2-20.

While the County could have done more analysis of the no-action alternative so that a clearer view of the maximum rate of extraction of the resource under each scenario could be determined, in light of the presumption of validity and the deference to be given to local decision-makers, we find that the environmental effects of the no-action alternative are "sufficiently disclosed, discussed and substantiated by supportive opinion and data." *Citizens Alliance to Protect our Wetlands v. City of Auburn*, 126 Wn.2d 356, 361, 894, P.2d 1300, 1995 Wash. LEXIS 157 (1995) citing *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 641, 860 P.2d 390 (1993).

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Conclusion: Petitioners have not met their burden of proving that the County's analysis of the no-action alternative fails to comply with SEPA. We, therefore, find that the no-action alternative is adequately analyzed.

Issue No. 2: Does the Final Supplemental Environmental Impact Statement (FSEIS) consider the potential development of a pit-to-pier project as a result of the MRLO?

Petitioners also challenge the County's compliance with the requirement to analyze identified potential impacts of transportation needs arising out of the MRLO designation. The Final Decision and Order found:

> The FSEIS pointed to a capacity problem with respect to truck transport of minerals from the new overlay site. However, the FSEIS failed to describe the current traffic or predict a range of future truck traffic that would be needed for increased mining activity. The FSEIS also failed to consider whether alternative forms of transport, such as the conveyor suggested by Fred Hill Materials, might be used and with what possible environmental impacts.

Final Decision and Order, August 15, 2003, Finding O.

Petitioners assert that the County's new environmental analysis still fails to consider the pit-to-pier project as a potential traffic alternative arising out of the MRLO designation. Petitioners' Objections to a Finding of Compliance at 11. Petitioners argue that the DSEIS implies that a marine transport system would have a beneficial impact on traffic on SR 104 while the FSEIS asserts that the marine transport system is not an alternative to trucking. Ibid.

The County answers that the DSEIS and FSEIS do analyze transportation impacts of the MRLO designation and that the marine transport system is not a potential outcome of the MRLO designation in any event. Reply Brief on Behalf of Jefferson County at 8. Intervenor further argues that Fred Hill Materials would continue to expand its operations, with or without the MRLO, and that it is this expansion of its operations, rather than the MRLO designation, that will lead to the pit-to-pier project. Intervenor's Response To Objections To A Finding Of Compliance at 6.

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The County and the Intervenor argue strenuously that the pit-to-pier project (also called the marine transport system) does not follow from the adoption of the MRLO. Ibid; Reply Brief on Behalf of Jefferson County at 6. They urge that it is the market that will determine the need for more material and that Fred Hill Materials will respond based on market demands, regardless of the MRLO. However, this argument misses the point of the Board's earlier findings. The County must analyze potential significant environmental impacts of its nonproject action in terms of the maximum development that might occur as a result of the nonproject action. In this case, maximum development is closely tied to the highest potential rate of extraction and the transportation modes needed to move the mineral resource recovered to markets to meet highest potential demand.

It is true, as Petitioners argue, that the DSEIS and the FSEIS fail to analyze the rate of extraction for purposes of determining what the maximum impact of the MRLO designation might be. For example, the DSEIS states that transportation impacts of the proposed action alternative would be a function of the rate of extraction, but it declines to examine the maximum potential rate of extraction:

> For resources extracted from the study area to be marketed within Jefferson County, SR-104 and other rural roadways would experience increased traffic volumes, primarily from haul vehicles, with increased traffic volumes being a function of the rate of extraction. In addition, the rate of extraction would be limited by the ability to use area roadways; if mining-related haul vehicles reduce level of service, restrictions may be placed on the number of vehicles accessing area roadways, possibly resulting in a lower need to extract material.
>
> If the trend set by FHM at its Shine Hub is followed, either by FHM or another mining company, for resource extraction in the study area, 90% of the extracted material would be exported from Jefferson County. The most likely export route from the study area, and ultimately from Jefferson County, would be over the Hood Canal Bridge to Kitsap County. If alternatives to truck transport of material to markets are developed, capacity issues with SR 104 could be avoided, and expanded markets for material could be developed.

DSEIS, March 2004, at 3-43. See also FSEIS, May 2004, at 1-7.

It is unclear why the County did not analyze, in the March 2004 DSEIS, the maximum rate of extraction under the various alternatives and the potential impact in each case on transportation. Fred Hill Materials has been very forthcoming with all of its potential development plans, from the very beginning advising the County of its intentions to expand its business and to develop a marine

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transport system, the "pit-to-pier" project. At argument, it was apparent that FHM has a great deal of technical information about the way extraction can occur in either the 40-acre areas or the 10-acre segments that it would be happy to contribute to the analysis.

Because of the lack of analysis of the potential maximum rate of extraction under the various alternatives in the DSEIS, the Petitioners are understandably skeptical about the assertion that the pit-to-pier project will occur regardless of whether the MRLO is approved or not. Petitioners' Objections to a Finding of Compliance at 14. ("This makes no sense.") However, the FSEIS does supplement the DSEIS analysis of transportation impacts with FHM's estimates of the maximum amount of mineral to be extracted with and without an MRLO. FSEIS at 2-4. The FSEIS states that the maximum extraction levels with the MRLO could rise to 7.5 million tons extracted annually. FSEIS at 2-4. This compares with 750,000 tons that could be extracted annually without the MRLO. Ibid. Under either alternative, Fred Hill Materials would transport 750,000 tons annually by truck. Ibid. This truck traffic would add 98 new daily trips to SR-104, or 0.7% to the volume already using that segment of SR-104. FSEIS at 2-3. The additional tonnage to be transported annually at the maximum expansion rate of 7.5 million tons annually (under an MRLO) would be transported via the pit-to-pier project. Four million tons would be transported by barge, and 2.5 million tons on ships that would require opening the Hood Canal bridge. FSEIS at 2-4.

In addition, we are unable to say that the DSEIS and FSEIS failed to alert the reader that the MRLO is likely to affect the amount of material that Fred Hill Materials can potentially excavate for other reasons. The comments of the Department of Natural Resources strongly suggest that it would not approve an expanded mining operation that relies upon a series of relatively shallow 10-acre mining segments rather than a larger, deeper, well-managed excavation area. DSEIS 2-19.

Petitioners argue that the FSEIS should have gone on to analyze: the impacts of marine transportation on Hood Canal; the potential impacts of marine transportation on the Hood Canal Bridge; the precedent of industrializing Hood Canal; and "numerous other environmental impacts which have led

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tribes, state-wide environmental groups, interagency entities such as the Puget Sound Action Team, and members of Congress to oppose the MLO". Petitioners' Objections to a Finding of Compliance at 16. Clearly, the County Commissioners could have required more detail in the environmental analysis. Particularly since the Commissioners will not have an opportunity to review the environmental impacts of the pit-to-pier project itself[4], the Commissioners might have chosen a more detailed evaluation of the likely environmental impacts of barge traffic and ships requiring opening the Hood Canal Bridge. However, the SEPA Rules give the lead agency "more flexibility in preparing EISs on nonproject proposals". WAC 197-11-442(1). The Rules provide that the lead agency shall discuss impacts and alternatives in the level of detail appropriate to the level of planning for the proposal. WAC 197-11-442(2). The general level of discussion of transportation impacts in the FSEIS was minimal, but within the range of acceptable levels for the evaluation of the adoption of the MRLO designation.

Conclusion: In light of these considerations and the standard of review generally, we find that the analysis of transportation impacts complies with the SEPA requirements for nonproject review of the Fred Hills Materials MRLO.

Issue No. 3: Did the County violate the public participation requirements of the GMA in adopting the comprehensive plan amendment designating the Fred Hill Materials MRLO?

Petitioners ask the Board to find the County violated the requirements for public participation in the enactment of the challenged comprehensive plan amendment because the County "published notice and instructed the large crowd that attended its first public hearing that the public could not discuss and the BOCC could not consider the contents of the SEIS." Petitioners' Objections to a Finding of Compliance at 18. The County responds that the June 7th public hearing was well attended (250 people in attendance) and 50 people testified at it; and that many written comments (129) were received. Reply Brief on Behalf of Jefferson County at 10. The County also notes that the audience at

[4] The pit-to-pier project will go through a hearing examiner review process instead.

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the June 7th hearing was advised that the County Commissioners would allow the public to "consider" the EIS documents in their comments. Ibid at 11.

Petitioners correctly advised the County that public comment on the supplemental environmental assessment should be allowed. Ex. 17-100. It is not readily apparent why the County took the position it initially did. Indeed, the County reversed itself after its May 25th hearing, and did allow public testimony and comments on the SEIS at the June 7th hearing. Ex. 10-11.

Petitioners argue that it is not enough for the County to correct its mistake at the next public hearing. "The Board needs to send a message that governmental hostility to public participation is not acceptable." Petitioners' Objections to a Finding of Compliance at 19. This Board (and both of the other Boards as well) has consistently held that the public participation requirement of the GMA is intended to ensure an open, clear, active, and ongoing dialogue between citizens and their local governments. See *WEAN v. Island County*, WWGMHB Case No. 95-2-0063 (Motions Order, June 1, 1995). In this case, the County mistook its obligations under SEPA and initially advised the public that comments on the environmental analysis were not permitted. Ex. 17-101. Had the County not corrected its position, we would be in a very different posture today. However, we do not agree with Petitioners that the only remedy is a finding of noncompliance. In fact, the County did in this case what the Board would have ordered it to do on remand – hold a hearing with open public comment on the environmental analysis.

Petitioners accused the County Commissioners of "hiding behind a false legal wall", both in restricting public comment and in making its decision on the application. Ex. 17-100. It has been unfortunate that the legal issues of notice of mineral resource uses and comment on SEPA documents should have taken such a prominent place in the County's compliance efforts. Nonetheless, there can be little doubt that the County Commissioners took responsibility for the policy decision they made in this case. Having heard the testimony and reviewed the many written comments received in this case, the Commissioners took them under consideration in their deliberations of June 30, 2004. Ex.

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17-105. The minutes demonstrate that they were cognizant of the public opposition to the MRLO and felt that they had appropriately distinguished the MRLO from the pit-to-pier project that will be reviewed for compliance with the Uniform Development Code by the County's hearing examiner. Ibid. While this Board might have responded differently to the environmental considerations presented to the County Commissioners, it is not the job of a growth management hearings board to substitute its judgment for that of the County Commissioners. The errors in restricting public testimony at the May 25th public meeting were corrected with the June 7th public meeting. The County stumbled on its way to the public hearing, but it ultimately righted itself and complied with the public participation requirements of the GMA.

Conclusion: The County failed to comply with the public participation requirements of the GMA at its May 25th public meeting, but corrected its error at the June 7th public meeting and ultimately complied with the public participation requirements of the GMA.

Issue No. 4: Did the County fail to comply with its obligations under SEPA by failing to identify the authors and principal contributors to the EIS?

Petitioners argue that the County also failed to comply with SEPA by failing to identify the authors and principal contributors to the EIS as required by WAC 197-11-440(2)(e). Petitioners' Objections to a Finding of Compliance at 17. The County does not appear to contest this allegation in its Reply. However, this failing does not appear to have any consequence in this case. Any error in failing to identify all the contributors to the SEIS is harmless. See *Thornton Creek Legal Def. Fund v. City of Seattle***,** 113 Wn. App. 34, 52 P. 3d 522, 2002 Wash. App. LEXIS 2569 (2002, Division I) ("We "review procedural errors during the EIS process under the rule of reason and where such errors are of no consequence, they must be dismissed." at n.40).

Conclusion: Any error in failing to identify all the principal contributors to the SEIS was harmless and is dismissed as a basis for finding a lack of compliance with SEPA.

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VI. FINDINGS OF FACT

1. Jefferson County is a county located west of the crest of the Cascade Mountains that has chosen to or is required to plan under RCW 36.70A.040.

2. Petitioners are organizations that, through their members and representatives, submitted written and oral comments before the SEPA "responsible official" and the Board of County Commissioners on all matters raised in the petition for review.

3. Intervenor, Fred Hill Materials, Inc., was the applicant for the mineral resource overlay designation that is the subject of this appeal.

4. This Board entered its Final Decision and Order on August 15, 2003, in response to Petitioners' challenge to the County's December 9, 2002, adoption of Ordinance 14-1213-02, amending the Jefferson County comprehensive plan with the addition of a mineral resource overlay (MRLO) requested by Fred Hill Materials.. That order found that the environmental analysis prepared for the MRLO failed to "adequately analyze the no action and other alternatives to the proposed action." The County was ordered to bring the challenged comprehensive plan amendment into compliance with the State Environmental Policy Act (SEPA) (Ch. 43.21C RCW) within 180 days.

5. The County originally scheduled the public hearing on this proposal for May 25, 2004. However, because of the overflow crowd, the County continued the hearing to June 7, 2004, when a larger facility could be used. On July 6, 2004, the Board of Jefferson County Commissioners adopted Ordinance No. 08-0706-04, approving the MRLO requested by Fred Hill Materials.

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6. The County argues that its notice provisions to neighbors concerning mineral resource activities in Commercial Forest lands are inadequate to protect the resource as required by RCW 36.70A.060(1). However, the ability to cure the avowed defect in the County's notice provisions lies in the County's sole control.

7. After adoption of the Fred Hill Materials MRLO, the same notice provisions that the County now believes are defective will still apply in all other parts of the designated Commercial Forest lands.

8. The no-action alternative was evaluated and compared to the other alternatives in the DSEIS and the FSEIS. The County's supplemental environmental analysis addressed environmental characteristics of the no-action alternative: acreage disturbed under the no-action vs. other alternatives; air quality impacts; water quality impacts; impacts on plants and animals; noise impacts; transportation impacts. (Summarized at 2-8 through 2-10 of the FSEIS).

8. The environmental impacts of the no-action (10-acre maximum) and approved alternative (40-acre maximum) are discussed at Section 2.8 of the DSEIS. This includes a summary description of the amount of mining material that might be extracted and the reclamation requirements under each alternative.

9. Under SEPA, the County must analyze potential significant environmental impacts of its nonproject action in terms of the maximum development that might occur as a result of the nonproject action. In this case, maximum development is closely tied to the highest potential rate of extraction and the transportation modes needed to move the mineral resource recovered to markets to meet highest potential demand.

10. The DSEIS and the FSEIS fail to analyze the rate of extraction for purposes of determining what the maximum impact of the MRLO designation might be. However, the FSEIS does

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supplement the DSEIS analysis of transportation impacts with FHM's estimates of the maximum amount of mineral to be extracted with and without an MRLO. FSEIS at 2-4.

11. The FSEIS states that the maximum extraction levels with the MRLO could rise to 7.5 million tons extracted annually. FSEIS at 2-4. This compares with 750,000 tons that could be extracted annually without the MRLO. Ibid. Under either alternative, Fred Hill Materials would transport 750,000 tons annually by truck. Ibid. This truck traffic would add 98 new daily trips to SR-104, or 0.7% to the volume already using that segment of SR-104. FSEIS at 2-3. The additional tonnage to be transported annually at the maximum expansion rate of 7.5 million tons annually (under an MRLO) would be transported via the pit-to-pier project. Four million tons would be transported by barge, and 2.5 million tons on ships that would require opening the Hood Canal bridge. FSEIS at 2-4.

12. The comments of the Department of Natural Resources strongly suggest that it would not approve an expanded mining operation that relies upon a series of relatively shallow 10-acre mining segments rather than a larger, deeper, well-managed excavation area. DSEIS 2-19.

13. The general level of discussion of transportation impacts in the FSEIS was minimal, but within the range of acceptable levels of evaluation of the adoption of the MRLO designation.

14. The County published notice and instructed the large crowd that attended its first public hearing on May 25, 2004, that the public could not discuss and the County Commissioners could not consider the contents of the SEIS.

15. Petitioners advised the County that public comment on the supplemental environmental assessment should be allowed. Ex. 17-100.

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16. At the June 7, 2004, public meeting, the County Commissioners reversed their earlier position and accepted public comment and testimony on the supplemental environmental assessment. Ex. 10-11. The County continued the May 25th public meeting to allow increased attendance (250 people attended) and 50 people testified at the June 7th public hearing. The County also received many written comments (129).

17. The County identified the majority but not all of the principal contributors to the DSEIS and FSEIS.

VII. CONCLUSIONS OF LAW

A. This Board has jurisdiction over the parties and subject matter of this compliance action.

B. Petitioners have standing to challenge this compliance action on the basis of their participation in the proceedings below.

C. The three alternatives were adequately analyzed under SEPA**.**

D. The analysis of transportation impacts complies with the SEPA requirements for nonproject review of the Fred Hills Materials MRLO

E. The County failed to comply with the public participation requirements of the GMA at its May 25th public meeting, but corrected its error at the June 7th public meeting and ultimately complied with the public participation requirements of the GMA. RCW 36.70A.140.

F. Any error in failing to identify all the principal contributors to the SEIS was harmless.

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G. The County's adoption of Ordinance No. 08-0706-04, approving the MRLO requested by Fred Hill Materials, complies with SEPA, Ch. 43.21C RCW as it applies to adopted comprehensive plans, development regulations, and amendments thereto pursuant to RCW 36.70A.280(2)(a) and 36.70A.300(1).

This is a final order for purposes of a motion for reconsideration pursuant to WAC 242-02-832 and appeal pursuant to RCW 36.70A.300(5).

SO ORDERED this 14th day of October 2004.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
Margery Hite, Board Member

_____
Holly Gadbaw, Board Member

_____
Gayle Rothrock, Board Member

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